No. 88-1125

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JANE HODGSON, M.D.; ARTHUR HOROWITZ, M.D.; NADINE T., JANET M., ELLEN Z., HEATHER P., MARY J., SHARON L., KATHY M., and JUDY M., individually and on behalf of all other persons similarly situated; DIANE P., SARAH L., and JACKIE H.; MEADOWBROOK WOMEN'S CLINIC, P.A.; PLANNED PARENTHOOD OF MINNESOTA, a nonprofit Minnesota corporation; MIDWEST HEALTH CENTER FOR WOMEN, P.A., a nonprofit Minnesota corporation; WOMEN'S HEALTH CENTER OF DULUTH, P.A., a nonprofit Minnesota corporation,

Petitioners,

vs.

THE STATE OF MINNESOTA; RUDY PERPICH, as Governor of the State of Minnesota; HUBERT H. HUMPHREY, III, as Attorney General of the State of Minnesota,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENTS

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QUESTIONS PRESENTED

1. May a state constitutionally require a physician to attempt with reasonable diligence to notify the parents of an unemancipated minor under the age of eighteen at least forty-eight hours before performing an abortion upon their daughter, if the notice requirement may be avoided by a court bypass system which, both on its face and in actual practice, meets the standards set forth by this Court for more burdensome parental consent statutes?

2. If the requirement that both parents be notified absent a judicial determination renders the Minnesota statute unconstitutional, is that requirement severable from the remainder of the statute as was clearly intended by the legislature?

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STATUTORY PROVISIONS INVOLVED

STATE LAWS

Minnesota Statutes § 144.341 (1988)
Minnesota Statutes § 144.342 (1988)
Minnesota Statutes § 144.343 (1988)
Minnesota Statutes § 645.451 (1988)

(The text of Minn. Stat. § 144.343 is reprinted in the Appendix to the certiorari petition of Hodgson *et al.* at 1a-4a. The text of the remaining statutes is reprinted in the Appendix to this brief at A-2.)

STATEMENT OF THE CASE

I. The Statute

In 1981 the Minnesota legislature enacted the Act of May 19, 1981, ch. 228, Minn. Laws 1011, which is codified as subdivisions 2 through 7 of Minn. Stat. § 144.343 (1988). 1a-4a.[1] Subdivision 2 of the statute generally provides that physicians or their agents must attempt with reasonable diligence to notify the parents of an unemancipated minor at least 48 hours before performing an abortion.[2] Subdivision 4 provides

[1] Page references with the suffix "a" refer to the appendix to the certiorari petition of Hodgson, et al.

[2] The age of majority in Minnesota is 18. *See* Minn. Stat. § 645.451, subd. 2 (1988). While there is no general statutory definition of the term "emancipation" in Minnesota, Minn. Stat. § 144.341 (1988) provides that any minor who is living apart from her parents, with or without parental consent and regardless of the duration of such separate residence and who is managing personal financial affairs, regardless of the source or extent of the minor's income, may give effective consent to any personal medical or other health services. Minn. Stat. § 144.342 (1988) provides that any minor who has been married or has borne a child may likewise give effective consent to any personal medical or other health services.

that 48 hour prior parental notice is not required when the parents have consented to the abortion, when prompt action is needed to preserve the life of the pregnant minor or when the minor reports that she is a victim of sexual abuse, neglect or physical abuse as defined in Minn. Stat. § 626.556 (1988).

Subdivision 6 provides that if subdivision 2 is ever enjoined by judicial order, then the same parental notification requirement shall be effective together with an optional procedure whereby an unemancipated minor may obtain a court order permitting an abortion without notice to her parents upon a showing that she is mature and capable of giving informed consent to an abortion or, if she is not mature, that an abortion without notice to her parents would nevertheless be in her best interests.

Any minor who files a petition pursuant to subdivision 6 is permitted to participate in the proceeding on her own behalf, and the court is empowered to appoint a guardian *ad litem*. There is an express statutory right to a court-appointed counsel upon request and a waiver of all filing fees. The statute further expressly provides that all proceedings shall be confidential and shall be given precedence over other pending matters so that the court may reach a decision promptly so as to serve the best interests of the pregnant child. An expedited, confidential appeal is also made available under subdivision 6 to any minor for whom the court denies an order.

II. Procedural History

Plaintiffs' [3] chronology of events at pp. 2-6 of their brief is substantially accurate and adequate save for its description of the rulings of the district court.

[3] The parties will be referred to in this brief by their posture in the district court where petitioners were plaintiffs and respondents were defendants.

In an order issued January 23, 1985, the district court granted partial summary judgment for defendants, dismissed all of plaintiffs' claims that the Minnesota statute, with the judicial bypass procedure of subdivision 6 in effect, was facially invalid or violated equal protection standards, and ordered all such claims dismissed. 146a-157a. In granting summary judgment, the district court acknowledged that this case was controlled as a matter of law by this Court's decisions in *Bellotti v. Baird*, 443 U.S. 622 (1979) (*Bellotti II*); *H. L. v. Matheson*, 450 U.S. 398 (1981); and *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983). The district court held that:

> The requirement of parental consent is more of a burden on a minor's right to choose an abortion than a requirement of parental notification. Thus, any parental notification/judicial bypass procedure which meets the Supreme Court's constitutional test established for parental consent/judicial bypass procedures is constitutional. . . . The Supreme Court, however, in *Bellotti II* suggests that a state may require a pregnant minor to obtain both parents' consent to an abortion as long as it provides an alternative procedure whereby authorization for the abortion can be obtained. *Bellotti II, supra*, 443 U.S. at 648-49. Accordingly, this court sees no constitutional infirmity with a two parent notification requirement.

151a.

Thus it is clear, and defendants reasonably believed, that trial in this matter was not to be held to explore through alleged "evidence" the correctness of the legal principles recognized by this Court in *Ashcroft* and *Bellotti II*. Nor did it appear that the supposed "burden" imposed by the underlying requirement of advance notice to both parents was to be tried

as an issue of fact insofar as it relates to the functioning of the Minnesota law.

What was reserved by the district court for trial was the question of whether the Minnesota judicial bypass system functioned in accordance with the *Bellotti II* standards.

> [T]he court is of the opinion that there are genuine issues of material fact in dispute on this claim and that defendants have failed to show that plaintiffs are not entitled to recover under any discernible circumstances. Specifically, plaintiffs have identified disputed issues of material fact relating to confidentiality, delays and inconvenience, and lack of access to the courts in rural counties. This list of material facts in dispute is not all inclusive. The court, at this moment, cannot accept defendants' contention that plaintiffs have presented only immaterial and anecdotal factual issues.

153a.

Upon these factual issues which *were* framed for trial, defendants were entitled to, and did, prevail.[4] The district court specifically concluded as follows:

> [Accordingly, the court concludes that the] judicial bypass procedure created by Minn. Stat. § 144.343(6), as presently executed by Minnesota courts and the other offices that participate in the bypass proceedings, complies with the procedural requirements set forth in *Bellotti II* and approved in *Ashcroft*. Therefore, the court must reject plaintiffs' challenge to Minnesota's notification/bypass requirement as a whole.

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[4] *See* Findings of Fact, Conclusions of Law and Order of the district court dated November 6, 1986, Findings No. 30-42, 17a-20a; Conclusions of Law, 44a-45a.

45a. (Bracketed material omitted from appendix.) Unaccountably, however, the district court, notwithstanding its conclusions of law upon summary judgment, invalidated the entire statute because it felt that the State had an obligation to prove that the forty-eight hour waiting period and the two-parent notice requirements were not unduly burdensome despite the availability of judicial dispensation. The district court concluded that the forty-eight hour waiting period could be severed but that the two-parent notification requirement could not.

III. Facts

A. Implementation And Operation Of the Minnesota Judicial Bypass System.

On July 31, 1981, the district court temporarily restrained enforcement of the parental notification requirement standing alone but denied plaintiffs' motion for an order temporarily restraining enforcement of the parental notification requirement operating in conjunction with the court bypass option. J.A. 31.[5] Thereafter on March 22, 1982, the district court issued a preliminary injunction to the same effect. By virtue of these two rulings, the judicial bypass procedure of subdivision 6 went into effect on August 1, 1981.[6]

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[5] Page references with the prefix "J.A." refer to the parties' Joint Appendix.

[6] On August 13, 1981, the Minnesota Supreme Court issued an order directing that judicial bypass petitions under subdivision 6 of the parental notification statute be filed and considered by the various county courts throughout the state or, in the cases of Hennepin and Ramsey Counties, in the juvenile division of the district court of each of those two counties. By the same order, the Minnesota Supreme Court directed that all appeals should be on the record to a judge of the district court, including the district courts of Hennepin and Ramsey Counties. D. Exh. 62, J.A. 482. In a subsequent order effective July 1, 1984, the Minnesota Supreme Court provided that, in a unified judicial district, an order denying a judicial bypass petition shall be appealable on the record to two district court judges, and if there be a division between those judges, the order denying the petition shall stand. D. Exh. 62A,

As set forth in the appendix to the district court's final order, from August 1, 1981 to March 1, 1986, 3,573 petitions were brought by pregnant minors pursuant to the judicial bypass procedure of subdivision 6.[7]

On a state-wide basis, a total of six petitions were withdrawn before a hearing. There is no evidence that any of the withdrawals was other than the minor's voluntary choice or that the court involved was not prepared to conduct an expedited, confidential hearing according to the terms of the statute.

A total of nine petitions were denied. There is no evidence to suggest that the denials were other than the result of the petitioner's failure to demonstrate either (1) that she was mature or (2) that an abortion without parental notification would be in her best interests. Indeed, the evidence indicates that the denials were justified.[8] The district court found that

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[7] The appendix to the district court's final order was omitted from the printing of the district court's final order as it appears in Petitioners' Appendix, at 10a *et seq.*, and is accordingly reprinted as an appendix to this brief at A-1. The appendix to the district court's final order is also reported at *Hodgson v. State*, 648 F. Supp. 756, 781 (D. Minn. 1986).

[8] Four of the denied petitions occurred in the City of Minneapolis (Hennepin County). Of these four petitions, one was denied after the minor told the court that her mother was forcing her to have an abortion; another was denied after the minor stated she did not want the abortion but preferred to get married; and a third was denied when the minor indicated that she was not sure whether or not she wanted an abortion. The fourth petition was initially denied when the minor was unable to express herself

"[w]ith the exception of a single hearing shortly after enactment of § 144.343," judges in Minnesota have applied the standards set forth in subdivision 6 by deciding petitions based upon whether the pregnant minor succeeded in showing either (1) that she is mature or (2) that even if she is not mature, an abortion without parental notification would be in her best interests. Findings 29-32, 17a-18a. Based upon the experience of these thousands of proceedings, the district court further found that judicial bypass hearings in Minnesota were systematically expeditious and that anonymity was carefully safeguarded and breached at all only in a small number of isolated cases. Findings 33-42, 18a-20a.[9]

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orally and the judge was thus unable to make a determination as to her maturity or best interest but was later granted upon rehearing a short while later. J.A. 150-53, 240-41, Widseth T. 27-30. Another denial occurred in St. Paul (Ramsey County) when a pregnant minor came to court accompanied by "a 30ish married man who was insisting that she have an abortion." T. 269. The court denied the petition after learning that the minor did not want an abortion and was fearful of her male companion. T. 269, T. 1286. References preceded by "T." refer to portions of the record not printed in the joint appendix. The witness' name also appears where the testimony of that witness is separately paginated.

[9] All judicial bypass proceedings were conducted in chambers or in closed courtrooms. J.A. 150, 156, 168-69, Albrecht T. 15. Court personnel, public defenders and guardians were mindful of the requirement of confidentiality. J.A. 327, 337, T. 273-74. The records of the proceedings were filed and maintained under seal. J.A. 335, Oleisky T. 41, T. 1742. In several cases petitioning minors have happened to have been acquainted with the judge, public defender or guardian *ad litem*. J.A. 206. In addition, one public defender had occasion to represent the stepdaughter of a probation officer and the niece of a judge. J.A. 246-47. However, on those occasions there is no evidence that the court personnel involved breached the confidentiality of the minor involved by communicating the fact of her petition to her parents or to any other third party. J.A. 206-11. Similarly, the public defender who represented the stepdaughter of a probation officer and the niece of a judge was able to make arrangements with the court to have the hearings held in different parts of the courthouse to avoid either of those two minors inadvertently encountering their relatives, and it appears that the confidentiality of these two particular judicial bypass proceedings was also preserved. J.A. 246-47.

[10] Of the 258 minors appearing before a particular Minnesota juvenile court judge in judicial bypass proceedings for the period August 1, 1981 to November 30, 1982, 5% claimed that their parents would force them to keep the child and 4% expressed the fear of the recurrence of physical abuse. P. Exh. 21, J.A. 381.

B. The Requirement Of Parental Notification Operating In Tandem With The Judicial Bypass Option Has Served Important Public Purposes.

1. Many Minors Will Not Voluntarily Initiate Needed Communication With Their Parents About Their Sexual Activity, Pregnancy And Abortion Decision, Even In The Absence Of Any Well-Founded Fear Of Abuse Or Harm.

The record is clear that in many cases minors will not voluntarily consult with their parents concerning their pregnancies or abortion decisions, even in the absence of any well-founded fear of abuse or other harm. While the statute was in effect, only a small minority of Minnesota teenagers sought to avoid notifying their parents on the basis of an apprehension that they would suffer physical abuse or that their parents would somehow prevent the abortion.[10] Moreover, the claims of even this small minority should be discounted to some extent in light of the testimony of a number of witnesses, including Dr. Hodgson, that adolescents often misapprehend their parents' likely reactions in response to their decision to obtain an abortion. J.A. 178-79, 336, 358-60, 473.

Rather than being usually motivated by any well-founded fear of abuse or harm, it appears that a common, if not the

most common, reason for the minor's desire to avoid parental notification is a general fear of damaging her relationship with her parents. P. Exh. 21, J.A. 381-82. This is so even in good, functional families. As plaintiff Meadowbrook's co-director, Paula Wendt, testified, based upon her substantial experience in counseling abortion patients, minors seeking to avoid parental notification commonly explain that desire on the basis of "not want[ing] to ruin a good relationship." J.A. 114. Katherine Welsh, executive director of plaintiff Women's Health Center, testified that minors do not always voluntarily involve supportive parents. T. 428. She explained that she "[has] always found" that her minor abortion patients "hate to destroy the good girl image" and "that is usually why they don't want to tell their father," T. 176, even when the father is loving and supportive. T. 427. Dr. Hodgson herself similarly testified that minors commonly seek to avoid notification as "a matter of love for their parents, and they don't want to spoil the relationship they have with their parents." J.A. 460. Dr. Hodgson also agreed with defendants' experts that notwithstanding the apprehensions of minors, parents are generally supportive in helping a minor deal with an unwanted pregnancy. J.A. 355-56, 473, P. Exh. 92 (Hodgson Depo. July 12) at 187.[11]

In summary, the record appears to be undisputed that, in the absence of a parental notification requirement, many pregnant minors will refrain from notifying their parents of their pregnancy or abortion decision, even in good, functional families where there is no well-founded fear of abuse or harm and even where the unnotified parents could and would be

[11] The trial testimony of Dr. Hodgson by deposition on July 11 and 12, 1985 was admitted as P. Exh. 92.

supportive in providing much-needed assistance to their daughters who commonly face a host of problems.[12]

2. There Was A Substantial Increase In Parental Notification During The Period In Which The Statute Was In Effect.

The frequency of parental notification increased substantially while the statute was in effect. Plaintiff Meadowbrook's co-director Paula Wendt has counseled thousands of minor abortion patients since 1971 and Meadowbrook is by far the largest provider of abortions to minors in the State of Minnesota. She testified that before the statute was enacted approximately 25% of all pregnant minors told one or both parents of their intended abortions. J.A. 113-14, 125-26. Both Ms. Wendt and Dr. Hodgson testified that while the law was in effect only about one-half of their minor patients chose the court bypass option. J.A. 123-24, 460. Since very few minors have been excused under the emancipation or abuse/neglect exemption, it follows that while the law was in effect the

[12] As a number of plaintiffs' experts concede, an unplanned pregnancy is an extremely traumatic event for a minor and subjects her to extreme psychological stress. J.A. 141, 304, 472. "Furthermore, most teenage girls do not focus on the decision whether or not to bear a child or how childbearing will affect their futures until forced to do so by an unintended pregnancy." Brief for Petitioners at 7. Moreover, teenagers who undertake a secret abortion without parental involvement are commonly faced with logistical and practical problems. As plaintiffs themselves have observed, many teenagers fail to recognize early signs of pregnancy and have little experience with the health care system and few financial resources, and Minnesota is a large state with extreme weather conditions in which teenagers might have to hitchhike long distances in order to accomplish a secret abortion. Brief for Petitioners at 10, n.20. These, of course, are all problems for which supportive parents might readily offer logistical, financial and emotional support.

percentage of those notifying both parents roughly doubled from 25% to 50%. Ms. Wendt's testimony concerning the actual *numbers* of court bypass patients indicates an even more dramatic increase in parental notification. From August, 1981 to December, 1985, Meadowbrook had a total of 2,895 minor abortion patients and of that total, 1,160 exercised the court bypass option. J.A. 123. Reducing these figures to a percentage discloses that while the law was in effect the percentage of minors notifying both parents more than doubled, increasing from 25% to roughly 60%.

The head counselor of the Planned Parenthood Clinic, Laura Hunter, testified that, in her opinion, the statute increased parent-child communication concerning pregnancy and abortion in some cases. T. 836-37. Hunter likewise testified that in her experience only 30-33% of pregnant minors had voluntarily told both their parents before being told of the statutory requirement, but approximately 50% of all minors went on to tell both of their parents in order to comply with the statute. T. 789-90.

In light of the foregoing testimony from plaintiffs' own witnesses, the district court's finding that there is no evidence that the Minnesota statute in actual operation has achieved its intended effect of increasing parental notification is clearly erroneous.[13]

[13] Plaintiffs attempt to bolster the erroneous finding by the district court by arguing that the court had interpreted "ambiguous" testimony and also by reference to statements by Thomas Webber, executive director of Minnesota Planned Parenthood, to the effect that over half of Planned Parenthood patients already had full parental involvement prior to the statute's enactment. However, the trial court gave no suggestion that it was "interpreting" conflicting or ambiguous testimony. It plainly although erroneously thought that none of the witnesses had testified to an increase in notification. Furthermore, the sole ambiguity contained in the Wendt testimony is whether the 25% notice level before the law became effective referred to one or two parent notice. *See* J.A. 113, 126. Defendants have given plaintiffs the benefit of any possible doubt in pointing out that notice to both parents more than doubled. If Wendt's actual statement (J.A. 113) that 25 percent told one or both were taken as true, then the increase is even more dramatic. The statements of Webber relied upon by plaintiffs were not admitted into evidence as bearing upon the issue of increase in notification. The statements were made as part of an offer of proof following sustained objections to testimony concerning what Webber and others told the legislature during legislative considerations of the bill. *See generally* T. 605-13. While it appears that the offer of proof was later received, it was not subject to cross-examination nor was it offered to establish an actual pre-statute notification level. Furthermore, even the Webber testimony concedes that approximately 21% of minors who would not otherwise notify their parents, would be willing to do so pursuant to a statutory notice requirement. T. 610. Finally, the statement of Webber, the executive, is directly contradicted by Laura Hunter, head counselor at Planned Parenthood's St. Paul clinic, who indicated that only between 30 and 33% of Planned Parenthood patients voluntarily informed their parents prior to being informed of the statutory requirement. T. 789.

C. The Minnesota Notification Statute Operating In Tandem With The Judicial Bypass Option Did Not Seriously Harm Any Minnesota Teenagers.

1. Not A Single Minor Was Shown To Have Suffered Any Physical Abuse Or Parental Obstruction Of Her Abortion As A Result Of The Statutory Notification Requirement.

Much of plaintiffs' evidence concerning the alleged "burdensomeness" of the parental notification requirement relates to the incidence of "dysfunctional" families and intrafamily violence in the United States generally. The State does not dispute that there exist dysfunctional families in which there is violence or abuse or that there are minors in Minnesota who are victims of violence or who fear violence. Nevertheless, al-

though parents of several thousand minors were notified of their daughters' decision to have an abortion pursuant to the statutory requirement from August 1, 1981 to March 1, 1986,[14] the record fails to reveal a single instance in which any such minor has suffered any violence as a consequence of the notification.

As noted above, a small minority of Minnesota minors have also sought to avoid notifying their parents of the abortion on the basis of an apprehension that their parents would somehow prevent the abortion from occurring. *See* P. Exh. 21, J.A. 381-82. Once again, however, of the several thousand pregnant minors who elected to notify both parents pursuant to the statutory requirement since August 1, 1981, the record fails to reveal a single instance of parental prevention of an abortion.

Notwithstanding her vast experience in providing abortions to minors in Minnesota during the entire four and one-half years when the statute was in effect, Dr. Hodgson herself testified that she was unaware of a single instance in which any minor sought an illegal abortion or attempted a self-induced abortion as a result of the statute. J.A. 475. Dr. Hodgson further testified that in her opinion the law has not had

[14] During this period 3,573 bypass petitions were filed in Minnesota courts. See Appendix to district court order reprinted in the appendix to this brief. Both Dr. Hodgson, J.A. 460, and Paula Wendt, the co-director of Meadowbrook Women's Clinic, J.A. 123, testified that only one-half of their minor patients chose the court bypass option. The actual figures offered by Wendt disclosed that only forty percent of Meadowbrook minors have chosen the court option. J.A. 123. Since relatively few minors have been excused under the emancipation or abuse/neglect exceptions, it is reasonable to conclude that the number of minors that have notified their parents is at least equal to the number that sought court dispensation. *See also* Opinion of the Circuit Court, at 83a n.9.

the effect of causing parents to become violent or to prevent their daughter from having an abortion. *Id.*

2. The Judicial Bypass Procedure Operated Expeditiously.

The district court expressly found that the judicial bypass hearings were generally determined on an expedited basis. 18a-19a. These findings are amply confirmed by the record. As a general matter, minors, if they so desired, could obtain a court hearing within one to three or four days. Finding 43, 20a, J.A. 325-27, T. 142, T. 278, T. 398-99, T. 1986-87. In the vast majority of cases, minors who elected the court bypass option had the abortion on the same day as their hearing. Wendt T. 149-50, T. 174.

In addition, departures from the regular hearing schedule were readily granted when warranted by any exigent circumstances such as minors who would otherwise have faced the increased medical risks and costs of a second trimester abortion or those who had traveled long distances and wished to avoid an overnight stay away from home. J.A. 169-70, 200, 211-13, 283, 286, 326. Minnesota courts also showed themselves to be available to accommodate any emergency hearings if the need should arise. J.A. 239, 283, Albrecht T. 11, T. 527.[15]

Of the 3,573 judicial bypass petitions heard between August 1, 1981 and March 1, 1986, the voluminous trial record fails to reveal a single instance where the proceedings were not completed with sufficient expedition to provide an effective opportunity for an abortion to be obtained.

[15] In one instance, the court in Duluth, Minnesota, conducted a hearing during the Thanksgiving holiday and on another occasion the same court made itself available on a Saturday. T. 370-73. There have been virtually no requests for weekend or nighttime hearings despite the willingness of Minnesota courts to accommodate such requests. T. 277-78.

3. The Minnesota Statute, With The Court Bypass Option In Place, Did Not Involve Medically Significant Delays.

It is undisputed that all other things being equal, it is medically preferable to have an abortion at an earlier gestational age than at a later gestational age. A delay of less than one week is generally not medically significant. Finding 53, 23a. Plaintiff Meadowbrook's co-director Paula Wendt and its co-owner Dr. Horowitz, an experienced abortion practitioner, each testified that there is no significant increased risk of medical complications from week to week within the first trimester and that delays of up to one and one-half weeks within the first trimester do not generally increase the risk of medical complications. J.A. 146-48, 370-73. Because minors, if they so desire, can obtain a court hearing within one to three or four days, it does not appear that any delays associated with the court bypass option would involve any statistically significant medical risks.

At page 14 of their brief, plaintiffs incorrectly assert that the district court found that judicial bypass minors were delayed "one week or more before their abortions," and that such delays were "unavoidable" under the terms of the statute. The district court made no such findings. To the contrary, the district court found that minors "typically" had their hearings within "two or three days" of their first contact with the court. Finding 34, 18a, Finding 43, 20a. With respect to any longer delays, the court simply observed that "[t]his delay may combine with other factors to result in a delay of a week or more." The defendants are unaware of what hypothetical circumstances the district court had in mind in making this observation. As noted above, the vast majority of court bypass

minors had their abortions performed on the same day as their bypass hearing. *See, e.g.*, Wendt T. 149-50.[16]

4. The Record Fails To Reveal That Minnesota Teenagers Suffered Medical Harm As A Consequence Of The Statute.

In any event, the record fails to establish a single instance in which any delay associated with completing the judicial bypass option has resulted in medical complication to any teenager. Moreover, Minnesota public health data disclose no statistically significant increase in medical complications among pregnant minors during the time the statute was in effect. Plaintiffs, in fact, conceded at trial that no medical complications

[16] Plaintiffs cite the experiences of only two class members. Plaintiffs claim that Heather P. and Sharon L. "had to wait two weeks and one and one-half weeks respectively for abortions because of delays attributed to the court bypass system." Brief of Petitioners at 14 n.30. These assertions are not borne out by the record. Heather P. did *not* testify that the court bypass procedure delayed her for two weeks. Rather, she merely testified that it was "probably" about two weeks between her mother's first call to the clinic and the subsequent court hearing and abortion. When asked to explain why this two week period elapsed, she indicated that she really didn't know and thought that perhaps it had something to do with her mother's work schedule. Heather P. T. 41. In fact, she had her abortion the very same day as the court hearing without any medical complication. *Id.* 47. Sharon L. merely testified that a week or a week and a half elapsed between the time she contacted the clinic and the day she went to court. She offered no testimony as to when the court appointment was requested nor did she testify that an earlier appointment was asked for. T. 725. Moreover, Sharon L. was only eight weeks pregnant at the time and thus was able to get a safe first trimester abortion without medical complication. T. 713.

had resulted from any delays allegedly caused by the law. J.A. 348.[17]

5. The Record Fails To Demonstrate That Minors Were Made To Undergo Second Trimester Abortions As A Result Of The Time Necessary To Complete The Judicial Bypass Procedure.

Plaintiffs falsely assert that the statute dramatically increased the proportion of minors obtaining second trimester abortions in Minnesota. Brief for Petitioners at 13-14. The district court made no such finding, and the record refutes this claim. Plaintiffs base the claim upon a misleading comparison

[17] Plaintiffs refer to the testimony of Katherine Welsh that two or three court minors vomited before or after their hearing. Brief for Petitioners at 9 n.16. Welsh acknowledged, however, that vomiting is a common symptom of pregnancy and she could not say whether the vomiting episodes were in fact caused by the court bypass process. T. 376-77. Plaintiffs refer to the testimony of Dr. Hodgson that she has had occasion to prescribe sedatives for court bypass minors. Brief for Petitioners at 9 n.16. Welsh testified, however, that although she has observed Dr. Hodgson prescribing valium for court bypass minors, her clinic also frequently prescribes valium for non-court minors. T. 382. Plaintiffs refer to the testimony of Welsh that on one occasion she thought that one minor was about to spontaneously abort during the court process. Brief for Petitioners at 9 n.16. Once again, however, there is no evidence in the record to indicate that the court bypass process caused this to occur or that its occurrence during the court process was other than mere coincidence. In addition, there is nothing in the record to indicate that this particular minor could not and did not receive timely medical attention. Plaintiffs have also argued in this litigation that laminaria, although medically indicated in some cases, cannot be used on patients who must go to court in Duluth and need to get their abortions done on the same day. Dr. Hodgson testified, however, that in the vast majority of laminaria cases, the minor has to be sent home overnight before completion of the abortion without regard to the judicial bypass. Hodgson Depo. July 12, 91-92.

of 1978 and 1983 data in a chart prepared by plaintiffs from abortion data maintained by the Minnesota Health Department. P. Exh. 122, J.A. 477. In direct contradiction to the assertion made by plaintiffs, the chart reveals that a substantial increase in the proportion of minors' second trimester abortions occurred *before* the statute took effect and that the proportion of such second trimester abortions actually *decreased* when the notice/bypass law was first enforced. Specifically, the data show that in 1980, the year immediately before the statute went into effect, 21.9% of the Minnesota resident minors who obtained abortions received second trimester abortions. In 1982, the first full calendar year after the statute went into effect, the proportion of second trimester abortions *declined* to 20.6%. The chart also shows that between 1979 and 1980—the years immediately prior to the statute—the proportion of second trimester abortions increased 3.2 percentage points (or 17.1%) from 18.7% to 21.9%. Thus, if there was a trend toward a greater percentage of later, second trimester abortions, it pre-dated the statute and was more pronounced before the statute was implemented than afterwards. The trend, therefore, cannot be attributed to the operation of the statute. In any case, Minnesota Health Department data reveal that average gestational age for minors undergoing abortions in Minnesota did not increase at all for the period 1980 through 1983.[18]

Plaintiffs are also incorrect in asserting that the district court found that a one-week delay was "unavoidable" under the judicial bypass procedure or that the judicial bypass procedure pushed some minors into the second trimester. Brief for Peti-

[18] The average gestational weeks for minors (patients 17 and under) was 10.73 weeks in 1980, 10.41 weeks in 1981, 10.36 weeks in 1982, and 10.73 weeks in 1983. D. Exh. 35, J.A. 481.

tioners at 14. To the contrary, the district court merely observed that even delays of less than one week "*may* push the minor into the second trimester." Finding 43, 20a, Finding 53, 23a. This observation by the district court involves no more than the obviously true proposition that a delay, however short, may possibly put any given minor into the second trimester if she were to seek to exercise the judicial bypass option on the very eve of the second trimester of her pregnancy.

In connection with their assertion that the judicial bypass procedure put some unspecified number of minors into the second trimester, plaintiffs cite only four cases involving some degree of unusual delay. These isolated cases do not support the proposition that court bypass delays commonly pushed minors into the second trimester. Kathy M. obtained a first trimester abortion, J.A. 274-75, and Bonnie L. and the unidentified Meadowbrook patient described in the hearsay testimony of Meadowbrook co-director Paula Wendt were already in their second trimester *before* seeking a bypass. J.A. 93, 137-38. Moreover, in these four cases at least part of the delay was attributable to the minor's preference or occurred to suit plaintiff Meadowbrook Clinic's schedule.[19]

[19] For example, Cynthia J. contacted the court on January 27 or 28 and made an appointment for February 9 *without* asking for an earlier appointment. J.A. 90-91. After her petition was granted on February 9, she did not make an appointment to have her abortion performed until February 16, by which time she was approximately 15 weeks pregnant. J.A. 83-84, 92. Similarly, although Paula Wendt testified that the hearing of one of her minor patients did not occur until eleven days after visiting Meadowbrook, there was no testimony that this 11-day delay was caused by the court's inability or unwillingness to schedule a more prompt hearing. J.A. 138. For example, an assistant with the Hennepin County juvenile court testified that minors sometimes select hearing dates to suit their own convenience and recounted how one minor asked for a court date more than three weeks from the date of her request. J.A. 327.

Moreover, each of these four particular minors was able to get her petition heard and decided with sufficient expedition to provide an effective opportunity for an abortion to be obtained, and the record fails to contain any evidence that any of these four minors or any others suffered any medical harm as a result of any delay associated with completing the judicial bypass procedures. Furthermore, these four instances of delay appear to be atypical.

6. There Has Been No Showing That Minnesota's Parental Notification Requirement Operating In Tandem With The Judicial Bypass Option Forced Any Teenagers Into Unwanted Motherhood.

The assertions in plaintiffs' statement of the case that the Minnesota statute forced Minnesota minors into involuntary motherhood or "stunted" anyone's life is without support in the record. The voluminous trial record fails to reveal a single instance in which any minor was prevented from obtaining an abortion and thus caused to carry to term by virture of the operation of the Minnesota statute.

Nor is there any finding or convincing evidence that supports plaintiffs' suggestion that the notification law caused an increase in births among teenagers in the City of Minneapolis. Brief for Petitioners at 12. In the period 1980 through 1984 the birth rate in Minneapolis in the age group 15-17 increased more than the birth rate for the age group 18-19. P. Exh. 116. These data fail, however, to demonstrate any sort of causal connection between these rising birth rates and the operation of the Minnesota statute or that the statute has caused pregnant minors not to seek abortions.

The birth rate is simply the number of live births per thousand population, P. Exh. 116, and does not contain any implication as to the number of abortions. By contrast, the Minneapolis data show a more comparable decline in the abortion rate and in the pregnancy rate for the period immediately before and after the enactment of the statute, both in the age group 15-17 and in the age group 18-19 which is not affected by the statute.

Moreover, there is no reason to believe that the Minneapolis data concerning birth and abortion rates is representative of Minnesota at large. Pregnancy, birth and abortion rates are substantially influenced by cultural, religious and socioeconomic factors which are substantially different in Minneapolis than the remainder of Minnesota. J.A. 344-45.

Finally, a number of witnesses testified that it would be speculative to attribute changes in such complex social phenomena as abortion and birth rates to the statute. J.A. 343-44, 369-70. Dr. Butzer, a child psychiatrist, who appeared as an expert on behalf of plaintiffs, testified that more widespread use of contraceptives, increasingly negative attitudes about abortions among teenagers, and heightened awareness of the dangers of sexually transmitted diseases have all been observed in Minnesota in the past several years and that these attitude changes among the teenage population are equally plausible explanations for any observed decline in the abortion rate. J.A. 301-04.

7. The Judicial Bypass Option Was Available To All Pregnant Teenagers Since The Enactment Of The Statute.

Plaintiffs' assertion that the judicial bypass was not an option "for many teenagers" (Brief for Petitioners at 23-24) is likewise unsupported by the record.

In support of their assertion, plaintiffs refer to the testimony of some state court judges to the effect that judicial bypass petitioners tended to be "white, middle to upper-middle-class kids." Though not explicitly stated, plaintiffs' implication appears to be that poorer, non-white teenagers were unable to secure a judicial bypass. As noted above, however, pregnancy, birth and abortion rates are substantially influenced by cultural, religious and socioeconomic factors. J.A. 344-45. Moreover, the minority population of the State of Minnesota is relatively low, and there was no evidence that the demographic profile of court bypass minors differed from that of minor abortion patients generally. Accordingly, there is no basis to suppose that the judicial bypass option was not generally available to Minnesota teenagers irrespective of race or socioeconomic status.

Plaintiffs have also exaggerated the record in stating that minors uniformly testified that they found the court procedure anxiety-provoking. The record does reflect that minors have experienced varying degrees of apprehension in attending judicial bypass hearings. There is abundant evidence, however, that the judicial bypass hearings have not been overwhelming experiences for minors generally. For example, in Hennepin County, which has had by far the most experience in applying the statute, the tone of the hearing is non-threatening, J.A. 341-42; a friendly atmosphere is created by the court personnel, J.A. 334-35; petitioners are more composed than others appearing in juvenile court, J.A. 170; and only a small minority are visibly upset at all, Albrecht T. 12. The experience of Ramsey County, the second most common venue for judicial bypass proceedings, has been similar. The juvenile court of Ramsey County has made every effort to make petitioners feel comfortable. J.A. 187-88. Ramsey County

petitioners typically have a "normal" demeanor, they are generally not visibly distraught and crying is very unusual. J.A. 286-87.[20]

Nor is there any substantial support in the record for plaintiffs' claim that inaccessibility or lack of resources placed the judicial bypass out of the reach of any minors. Abortion providers are readily available in only five Minnesota counties, 14a, whereas the court bypass system is available to minors throughout the state. If minors have the resources to utilize these abortion providers, there is no reason to believe, absent specific evidence to the contrary, that they would not have the resources to avail themselves of a judicial bypass hearing.

8. Plaintiff Abortion Providers Prevent Their Minor Patients From Taking Full Advantage Of The Available Statutory Exceptions.

Plaintiff Meadowbrook has been the leading provider of abortions to minors in Minnesota, having performed 2,895 such abortions in the period between August, 1981 and December, 1985. J.A. 123-24. It appears, however, that Meadowbrook has systematically deprived its patients of otherwise available statutory exemptions from the requirement of parental notification by misinforming them as to the nature of both the abuse and the emancipation exceptions.

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[20] In support of their assertion that minors "uniformly" find the court procedure anxiety-provoking, plaintiffs quote from the testimony of two minors, Clara Z. and Rose C. to the effect that the proceedings made them feel as if they had done something wrong. Brief for Petitioners at 24 n.53. It must be borne in mind, however, that of the state-wide total of 3,573 judicial bypass petitions, the entire record contains the testimony of only six minors who described the proceedings as accusatory in any sense. *See* P. Exh. 95 at 10; P. Exh. 97 at 7; P. Exh. 98 at 23; P. Exh. 108 at 18; P. Exh. 111 at 8; J.A. 221.

Although Meadowbrook informs inquiring minors that there is no need for parental notification or a court order in cases of sexual abuse, it routinely refrains from advising minors that the statutory abuse exception also applies in cases of physical abuse or neglect, even though it is specifically aware that such cases also fall within the statutory exception. Wendt T. 163-66; P. Exh. 70A, J.A. 429. Moreover, even where a minor reports that she is the victim of sexual or physical abuse or neglect, Meadowbrook requires such minors to obtain a judicial bypass order unless she has also *previously* reported the abuse to a child protection agency and that agency has already made "a determination" of the abuse allegation, even though the statute does not prescribe such preconditions. J.A. 149-50, Wendt T. 184. Furthermore, it appears that in Duluth, as well, exempt minors have been unnecessarily sent to court. *See* testimony of Judge Martin, Petitioner's Brief at 19, n.42; J.A. 204.

It likewise appears that Meadowbrook does not permit its minor patients to take full advantage of the emancipation provisions contained in Minn. Stat. §§ 144.341 and 144.342 which provide that notwithstanding any other provision of law, any minor who is living separate and apart from parents, regardless of the duration of such separate residence, and any minor who is married or has a child and who is managing financial affairs, may give effective consent to medical services without the consent of any other person. Although Meadowbrook considers a minor emancipated if she lives away from home and is self-supporting, Meadowbrook unilaterally imposes a "stricter" standard by requiring that the minor "have lived away from home for at least six months and bring . . . copies

of her rent receipts, utility bills and paycheck stubs." Wendt T. 50.[21]

9. The Record Fails To Confirm That The Parental Notification Requirement Of The Minnesota Statute Was "Especially Disastrous" In Single Parent And Abusive Family Situations.

One of plaintiffs' experts, Dr. Walker, alluded to studies that revealed that the incidence of violence in abusive, dysfunctional families is more frequent in pregnancy, immediately following childbirth and during adolescence. J.A. 193. Notwithstanding such studies, however, there is no evidence in the record that any such violence in fact occurred as the result of the Minnesota statute. Although more than 3,500 minors have notified both of their parents since the statute has been in effect, the record fails to reveal a single instance in which such notification has provoked any violence or physical abuse on the part of the involuntarily notified parent in any single parent or abusive family situations.[22]

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[21] By way of contrast, the Midwest Health Center Clinic, which does far fewer abortions, correctly recognizes that the statutory exception extends to cases of physical abuse as well and that there is no requirement that the abuse either has been previously reported to or its existence determined by any child protection agency. P. Exh. 73, J.A. 436-37. Unlike Meadowbrook, the Midwest Health Center Clinic likewise recognizes and advises its patients that the emancipation exception applies to minors who are married or have borne a child. *Id.*, J.A. 435.

[22] In arguing that minors from broken or dysfunctional homes met with delays in complying with the statute, plaintiffs refer to a situation where a minor allegedly suffered a two-week delay because the notified father refused to acknowledge paternity. Brief for Petitioners at 15. The statute, however, imposes no requirement of written authorization or acknowledgement of paternity.

SUMMARY OF ARGUMENT

In Case No. 88-1309, defendants argue that a parental notification requirement represents a reasonable balance between recognition of the strong and proper interests of the state and parents in relation to the ultimate rights of minors to make the abortion decision and, therefore, that there is no constitutional imperative for such a requirement to be accompanied by a judicial bypass alternative. Even if it be decided, however, that a parental notification requirement standing alone is not permissible, the Minnesota statute should be found to be constitutional when operating in tandem with a court bypass system which, both on its face and in actual practice, meets the standards set forth by the Court for more stringent parental consent statutes.

Nor have plaintiffs presented new facts which should lead this Court to overrule already established constitutional standards regarding the legitimate scope of parental involvement in the abortion decisions of minors. Contrary to the inaccurate, misleading and exaggerated statements in plaintiffs' brief, the operation of the Minnesota parental notification requirement with the court bypass alternative available has not resulted in "disasters" and has not been shown to have seriously harmed pregnant minors seeking abortions in Minnesota. Plaintiffs concede that there was not a single medical complication caused by operation of the statute, and no Minnesota teenager was shown to have been forced into unwanted motherhood as a result of the statute.

If, for some reason, the statute as written cannot pass constitutional muster even with the judicial bypass option in place, the portions found by the district court to create an unnecessary burden, should be severed. That action has been

expressly called for by the Minnesota Legislature and can be accomplished without otherwise interfering with the operation of the statutory scheme.

ARGUMENT

I. THE DECISION OF THE EIGHTH CIRCUIT UPHOLDING THE MINNESOTA NOTICE/BYPASS STATUTE IS CONSISTENT WITH STANDARDS ALREADY ESTABLISHED BY THIS COURT AS A MATTER OF LAW.

The constitutional privacy right declared in *Roe v. Wade*, 410 U.S. 113 (1973), has never been considered absolute or unqualified. *Id.* at 154; *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 60-61 (1976). Thus in its most recent decision concerning abortion, a majority of the members of the Court appear to conclude that a regulation of abortion is permissible if it is reasonably designed to further a "legiti-mate" state interest and does not unduly burden the abortion process. *Webster v. Reproductive Health Services*, 57 U.S.L.W. 5023, 5031 (U.S. July 3, 1989) (plurality opinion of Rehnquist, C.J., White, J., and Kennedy, J.); *id.* at 5033 (O'Connor, J., concurring); *id.* at 5034 (Scalia, J., concurring).

While much remains uncertain concerning the permissible scope of state statutes touching upon abortion, this Court has clearly established that parents and society at large both have strong, legitimate and long standing interests in promotion of parental involvement in important matters involving their minor children, including abortion. The Eighth Circuit's decision upholding Minnesota's notice/bypass statute is consistent with the Court's clearly established standards, and should therefore be affirmed.[23]

[23] Defendants do not argue that *Roe v. Wade* should be overturned.

In numerous cases this Court has recognized the "cardinal" principle that parental involvement in the care and nurture of children is vital to the very structure of our society. *See, e.g., Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972). This cardinal principle is equally applicable to issues involving health care for a child,[24] including abortion. *See Bellotti v. Baird*, 443 U.S. 622 (1979) (*Bellotti II*); *H. L. v. Matheson*, 450 U.S. 398 (1981); *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983).

Despite the strength of these cardinal principles, however, this Court has determined that in light of what was viewed as the "unique" and "nonpostponable" nature of the abortion decision, a state may not go so far as grant a parent "an absolute and possibly arbitrary veto over the [abortion decision of a minor.]" *See Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976). In Case No. 88-1309, defendants have argued that the requirement of mere parental notification gives no one a veto power, either explicitly or implicitly, and that, in contrast to *Danforth*, it is constitutionally permissible to strike a balance between the "rights" of minors ultimately to obtain abortions and the strong interests of the state and parents in the care, nurture and raising of minors by requiring that those persons to whom our society, legal system and constitution have committed the care and upbringing of children have a reasonable opportunity to *know* critical, stressful and potentially hazardous situations facing their child. Even if it be held, however, that a state may not require even parental notice without some form of situational avoidance procedure, it is clear that the Minnesota statute is constitutional when operating in tandem with a court bypass system which, both

[24] *See, e.g., Parham v. J.R.*, 442 U.S. 584 (1979) (hearing not required prior to parents admitting children to mental health facilities).

on its face and in actual practice, meets the standards set forth by the Court for more stringent parental consent statutes.

While *Bellotti II* found invalid a Massachusetts law requiring parental *consent* for minors' abortions and providing for a form of court bypass procedure, Justice Powell, in announcing the judgment of the Court with the concurrence of three other Justices, went on "to provide some guidance as to how a state constitutionally may provide for adult involvement . . . in the abortion decisions of minors."[25]

> . . . We therefore conclude that if the State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained.
>
> A pregnant minor is entitled in such a proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests. The proceeding in which this showing is made must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained. In sum, the procedure must ensure that the provision requiring parental consent does not in fact amount to the "absolute, and possibly arbitrary, veto" that was found impermissible in *Danforth*.

Id. at 643-44 (footnotes omitted).

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[25] *Bellotti II*, 443 U.S. at 651-52, n.32.

The concurring opinion of then-Associate Justice Rehnquist underscores the intent of the plurality to establish, as a matter of law, criteria upon which states and lower courts could rely in enacting and identifying constitutionally valid statutes calling for parental involvement in minors' abortions. *Id.* at 651-52.

The applicability of the *Bellotti II* plurality standard as a matter of law in judging parental consent statutes was subsequently confirmed in *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983). In that case, Justice Powell noted that "the relevant legal standards with respect to parental-consent requirements are not in dispute." *Id.* at 490. *See also id.* at 505 (O'Connor, J., concurring in part and dissenting in part).

Furthermore, in the only case to consider a statute merely requiring parental notice the Court upheld a Utah statute requiring parental notice, but withheld judgment upon whether that requirement could be applied to a girl who was mature or emancipated. *H. L. v. Matheson*, 450 U.S. 398 (1981). It is clear, however, that a majority of the Court supported the concept of parental notification, at least if a court bypass option is available. *Id.* at 413-20 (Powell, J., with Stewart, J., concurring). *Id.* at 420-25 (Stevens, J., concurring).

These cases clearly demonstrate the constitutional principle that a state may require parental involvement, even parental consent, if it also provides an expeditious, anonymous procedure whereby a minor can demonstrate either sufficient maturity or "best interest" to permit avoiding that involvement. Nothing in the Court's holdings in these cases has contained the slightest hint that their validity is dependent in any way upon state-by-state factual proof that parents in the state are really concerned with welfare of their children, or that their

involvement in the life crises and decisions of their children really serves a proper and compelling purpose. To the contrary, these cardinal and fundamental principles are taken as established beyond dispute.

As pointed out above, the district court found, after a complete trial that the Minnesota statute with the bypass system in place conformed, both on its face and as applied, with these standards. 146a-57a, 17a-20a. The court concluded that Minnesota judges, hearing over 3,500 petitions, applied the appropriate legal standards, and the proceedings were, on the whole, properly expeditious and anonymous. 44a-45a.

In upholding the Minnesota law, the Eighth Circuit Court of Appeals has merely applied the legal standard established by this Court to the relevant facts found by the trial court. Therefore, this case does not present an appropriate occasion for the Court to rekindle uncertainty in the states and lower courts concerning the reliability of the Court's holding on such an issue.

II. THIS CASE PRESENTS NO NEW "FACTS" WHICH SHOULD LEAD THIS COURT TO OVERRULE ALREADY ESTABLISHED CONSTITUTIONAL STANDARDS REGARDING THE PERMISSIBLE SCOPE OF PARENTAL INVOLVEMENT IN THE ABORTION DECISIONS OF MINORS.

Plaintiffs assert that considering the effect of the statute "in actual operation" should lead this Court to overturn it despite the fact that it conforms in all respects with the principles articulated in *Bellotti II*, *Matheson* and *Ashcroft*. The record of the statute in operation, however, provides no new basis to retreat from those principles.

In pursuit of their "as applied" argument, plaintiffs cite two sorts of cases. One line, exemplified by *Carey v. Population Services Int'l*, 431 U.S. 678 (1977) and *First National Bank v. Bellotti*, 435 U.S. 765 (1978), really do not address examination of a statute as applied at all. Rather, they indicate that in the case of facial examination of certain government restrictions, the government may be required to demonstrate a proper nexus between a public purpose sought to be served and the mechanism of regulation. From these cases, plaintiffs leap to the conclusion that the Minnesota law should be struck down because (they claim) the State did not prove at trial that the law actually achieved its goals in an unspecified quantity of cases. This argument is spurious.

The authority of a state to enact a statute requiring parental involvement and even consent has been confirmed by this Court, as a matter of legal and constitutional principle. *Compare First National Bank v. Bellotti, supra*, 435 U.S. at 790, where this Court suggests that a statute may be justified as well by arguments which are either inherently persuasive or supported by precedents of the Court. This Court has already confirmed that statutes requiring parental consent or notice are properly related to a sufficient state purpose. It is unreasonable in this context to assert after trial that the statute should be held invalid because the State did not factually reestablish the basis for this Court's prior opinions in the matter of parental involvement in minors' abortions. Indeed, to adopt plaintiffs' argument would utterly destroy the concept of *stare decisis*. No litigant could safely rely on established precedent but would have to reprove the factual and policy bases for each case relied upon.

Furthermore, the support for the Minnesota statute is both

inherently persuasive (*i.e.* parents, whom even plaintiffs concede are generally helpful and supportive, cannot be of any use to a child in trouble if they have no knowledge of the trouble) and supported by the record. *See* pp. 6-12 *supra*.

The second line of cases cited by plaintiffs are more in keeping with traditional "as applied" analysis. That is, they permit inquiry into whether a law, valid on its face, is either being administered in a way, or is achieving a result, previously identified as unacceptable. *See, e.g., Bowen v. Kendrick*, 108 S. Ct. 2562, 2580 (1988); *Buckley v. Valeo*, 424 U.S. 1, 97 (1976). With respect to this "as applied" analysis, it is clear that the statute was in fact administered in accordance with the standards previously established by this Court and that no harm or alleged burdens were shown to have occurred in Minnesota which had not been previously considered by the Court.

In the very first paragraph of their argument, plaintiffs make the incredible assertion that "[t]he disastrous impact of this law on the health and lives of the plaintiff classes is undisputed." Brief of Petitioners at 27. Not only has this point been consistently and vehemently disputed throughout the history of this litigation, it is clear that despite the length of the trial and the size of the record, plaintiffs failed to demonstrate any "disastrous" consequences to any real minors of the plaintiff class. Indeed, when pressed on the matter of adverse health results of the statute's operation, counsel for plaintiffs expressly conceded that there were no adverse medical complications to any member of the plaintiff class as a result of any delays associated with compliance with the statute. J.A. 347. In fact, while plaintiffs through their clinics had access to virtually all of the abortion patients in Minnesota for over four years of operation of the statute, they were able to pro-

duce no examples of the "disasters" they insist are inherent in the statute. No named class representatives suffered significant adverse health problems as a result of the law. No class representatives were shown to have been physically abused as a result of the statute. No minors were shown to have been forced into unwanted motherhood because of the statute.[26]

Nor has any substantial body of hitherto unknown facts been brought to light in this action which should cause this Court to retreat from the constitutional doctrine established by *Bellotti II*, *Ashcroft* and *Matheson* that a state may require parental involvement, even parental consent, if it also provides an expeditious, anonymous procedure whereby a minor can demonstrate either sufficient maturity or "best interest" to avoid that parental involvement. To the contrary, plaintiffs' evidence does little more than reiterate matters of fact and opinion already considered by this Court in prior decisions setting forth the standards for parental involvement in minor children's abortions.

As was recognized by the Eighth Circuit, the cases of *Bellotti II*, *Matheson* and *Ashcroft* were not decided in an in-

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[26] Even if it were to be proven that, as a consequence of the Minnesota law, some minors elected to give birth rather than undergo an abortion, that would not in any sense establish that anyone was *forced* into unwanted motherhood unless one accepts the unstated and plainly absurd assumptions that every decision to give birth is coerced and motherhood is, by definition, unwanted.

However, as Justice Powell recognized in *Bellotti II*:

> [A]n abortion may not be the best choice for the minor. The circumstances in which this issue arises will vary widely. In a given case, alternatives to abortion, such as marriage to the father of the child, arranging for its adoption, or assuming the responsibilities of motherhood with the assured support of family, may be feasible and relevant to the minor's best interests.

443 U.S. at 642-43.

tellectual or sociological vacuum. 85a. This Court has long been aware of, and has given full consideration to, the claims that some minors may be considered sufficiently mature to make abortion decisions independently,[27] that there may be some parents who wish to obstruct the abortion decision,[28] that some parents may be abusive, and that not all parents would necessarily provide helpful communication and support.[29]

The Court has also considered the "burdens" that a judicial bypass procedure inevitably creates for pregnant minors and has found those burdens to be outweighed by the state's important interests in protecting the well-being of minors. Indeed, in *Ashcroft* the Court held constitutional a judicial bypass statute which conformed to the requirements of *Bellotti II* in the face of uncontradicted testimony that the procedure "might well engender delays of 13 days or more, forcing many minors to pass into a later stage of pregnancy," and despite apparently uncontradicted expert testimony that compliance with the judicial bypass procedure under the Missouri statute would increase the total cost of the abortion procedure for minors choosing the judicial bypass alternative.[30]

Similarly, the Court in *Bellotti II* reviewed uncontradicted expert testimony that any judicial bypass proceeding, even if conducted in the most benign manner, could possibly be inconvenient to a teenager. The plurality was also fully mindful that even a judicial bypass procedure conforming to the stan-

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[27] *See Bellotti II*, 443 U.S. at 628, 653.

[28] *Id.* at 647; *Matheson*, 450 U.S. at 438-39 (Marshall, J., dissenting).

[29] *Matheson*, 450 U.S. at 424 (Stevens, J., concurring) and 438 n.24 (Marshall, J., dissenting).

[30] Reply Brief of Petitioners at 7-8, *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. at 476 (1983).

dards laid down in *Bellotti II* would necessarily involve some procedural difficulties and some delay in the performance of an abortion with increased health risks to the minor.[31] Nonetheless the general rule has been established that a state may require both notice and consent of parents prior to a minor's abortion at least so long as "mature" and "best interest" minors are not subject to absolute veto by their parents.[32]

The record reflects virtually no facts which would call for invalidation of the Minnesota statute, after some five years of operation. Rather, plaintiffs fall back upon the same alleged "burdens" which were already considered in prior cases. Moreover, for all their research and investigation, plaintiffs have failed to identify a single Minnesota minor who was prevented from having an abortion or who suffered any medical harm or parental abuse as a result of either notifying her parents or going to court.

Far from presenting a record which demonstrates that the principles embodied in *Bellotti II* and *Ashcroft* fail in practice, the instant case demonstrates that a statutory notice/bypass system patterned after the *Bellotti II*/*Ashcroft* standards can increase the potential for parental involvement and provide effectively for a judicial alternative without causing constitutionally significant hardships for the minors involved.

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[31] Brief of Intervenor-Appellee *Planned Parenthood League* at 47-52, *Bellotti v. Baird*, 443 U.S. 622 (1979).

[32] *Bellotti v. Baird*, 443 U.S. 622 (1979); *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983); *H. L. v. Matheson*, 450 U.S. 398 (1981).

III. THE REQUIREMENT THAT BOTH PARENTS BE NOTIFIED AND THE LENGTH OF THE WAITING PERIOD DO NOT RENDER THE MINNESOTA LAW INVALID WHEN BOTH REQUIREMENTS CAN BE AVOIDED BY RESORT TO THE COURT BYPASS OPTION.

Plaintiffs argue that the 48 hour length of the waiting period and the requirement that both parents be notified render the Minnesota statute unconstitutional, even when both of these requirements can be avoided by resort to the court bypass option. This argument is likewise without merit.

Minors who elect to have their parents notified by written notice must wait until 48 hours after actual or constructive delivery of written notice. Constructive delivery of mail notice occurs at noon on the regular mail delivery date following mailing. Thus the effective length of the statutory parental notice may in some instances be 72 hours.

With respect to the actual operation of the 48-hour waiting period, the district court found that:

> This statutorily imposed delay frequently is compounded by scheduling factors such as clinic hours, transportation requirements, weather, a minor's school and work commitments, and sometimes a single parent's family and work commitments. In many cases, the effective length of delay may reach a week or more.

Finding 52, 22a-23a.

The court's finding regarding possible delays of a week or more appears to be based upon facts relating to the relative inaccessibility of abortion services in Minnesota. Findings 22-25, 14a-15a. As recognized by the court of appeals, however, it is not apparent from the record how these logistical difficulties would cause the 48-hour notice requirement to result in delays of a week or more. Typically, when a pregnant minor telephones an abortion clinic to arrange an abortion, the operation, in the absence of unusual medical circumstances, is not scheduled to occur sooner than 48 or 72 hours hence. J.A. 146-48, 370-71. Opinion of the Circuit Court, 97a. Accordingly, in such typical cases it does not appear from the record that the fulfillment of the 48 hour parental notice requirement delays the abortion operation at all.[33] In any event, the record fails to establish a single instance in which any delay associated with the length of the parental notification requirement has resulted in medical complication.

The district court further acknowledged that "[s]ome period of mandatory delay between the time of actual or constructive notification of the minor's parent and the abortion itself would reasonably effectuate the State's interest in protecting pregnant minors" and that "[a] waiting period may allow parents to aid, counsel, advise, and assist minors in determining whether to undergo an abortion or to provide the physician with information which may be relevant to the medical judgments involved." Finding 73, 32a. The district court also found, however, that:

> The interest effectuated by the State's 48 hour waiting period could be effectuated as completely by a shorter waiting period. Therefore, to the extent the waiting

[33] For example, the telephone training manual of Meadowbrook Clinic indicates that if a pregnant minor calls on a Monday and reveals that she wishes to comply with the statute by mailed parent notification, the notification is mailed on that same day and the abortion may be scheduled as soon as Thursday. *See* P. Exh. 70A, at p.4, J.A. 433.

> period exceeds that necessary to allow parents to consult with minors contemplating abortion, it fails to further the State's interest in protecting pregnant minors.

Finding 74, 32a. The district court does not otherwise explain the basis of this finding, and defendants are unaware of any evidence in the record to support it.

The two-parent aspect of the notice requirement is likewise not unduly burdensome. Plaintiffs' primary argument that the requirement of notifying both parents renders the statute invalid in situations in which a one-parent notification might be upheld appears to have no firmer basis than plaintiffs' objection to parental notification generally, *i.e.*, that there may exist some parents who may act in an inappropriate fashion.[34]

Plaintiffs do point to a finding by the district court that minors who would voluntarily notify one parent "may be" dissuaded from doing so by the two-parent notice/court bypass alternative, and therefore, this statute somehow undercuts the goal of securing parental involvement. Neither the trial court nor plaintiffs, however, suggest any basis for this plainly irrational statement. Certainly the record of the numbers of minors who have gone to the judicial bypass alternative after having notified one parent does not support the statement.[35] Nor does it make any logical sense whatever. If a minor would, absent any legal mandate, notify one parent voluntarily, it can

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[34] *See* Brief of Cross-Petitioners in Case No. 88-1309 at 16-17.

[35] The district court found that 20-25% of minors seeking court orders to avoid notification had voluntarily notified one parent. 22a. This is about the same proportion that plaintiffs' witnesses indicate would notify a parent absent a statutory requirement to do so. J.A. 113-14, 125-26. See also the testimony of Planned Parenthood Counselor Laura Hunter who indicated that often a girl who had notified one parent would proceed to notify the other upon being informed of the statutory requirement. J.A. 247-48.

only be because she perceives that it is in her interest to do so. Even if we assume that she perceives it undesirable to further notify the second parent, however, no reason is suggested why avoiding notice to that parent would change in any way her perception of the desirability of notice to the first.

Given the Minnesota law with the judicial bypass in operation, if she obtains a court determination that parental notice is not required, she is free to tell one, both or neither of her parents as her own wishes dictate. This is the same position she would be in absent any statute on the subject. Thus, there is simply no evidence or rationale to support the conclusion that the Minnesota law in any fashion creates a deterrent to a minor's voluntarily notifying any parent she may in fact wish to involve.

In any event, even if the requirement that *both* parents be notified or the *length* of the notice period could, in some instances, be seen to impose an unnecessary "burden," this would provide no basis for striking down the notification requirement operating in conjunction with the court bypass option. If it is to be the case that an *ex parte* judicial bypass alternative is a constitutionally required element to a parental notification requirement, this can only be because the underlying notice requirement, standing alone, is occasionally unduly burdensome upon the abortion decision. It is indeed only that assumption which could support the necessity of a bypass option in the first place.

In *Bellotti II* this Court addressed a Massachusetts statute which required the consent of *both* parents for a minor's abortion subject to a court bypass mechanism. Justice Powell's opinion recognizes this fact and finds it permissible if a proper bypass system is available. 443 U.S. at 648-49. Furthermore,

in *Matheson* the Court declined to find unconstitutional a statute which required notice to both parents but provided no specific court bypass option. In neither of these cases did the Court suggest that the state is constitutionally limited to a one-parent requirement.

It is true that neither *Bellotti* nor *Matheson* dealt with a statute containing a specified waiting period. Ironically, the lack of such a waiting period caused the dissenters in *Matheson* to criticize the statute as not well suited to further parental consultation. *See Matheson*, 450 U.S. at 446 (Marshall, J., dissenting).

The type of statute discussed in *Bellotti* contained no set waiting period, because it was a *consent* statute. Therefore, absent the court bypass, the wait could be very brief if consent was forthcoming, or indefinite if it was not. The court bypass requirement was thus imposed to act as a check against the passive arbitrary parental veto of the nonpostponable abortion decision by indefinite withholding of consent.

Like *Bellotti II*, a Minnesota minor could avoid any waiting period at all by obtaining parental consent. Also, as with the *Bellotti* statute, a "mature" or "best interest" Minnesota minor could avoid the 48-hour notice requirement by the court bypass mechanism. Unlike the *Bellotti* statute, however, a Minnesota minor was never subjected to indefinite delay caused by parental inaction. She could, in any event, proceed with an abortion after 48 hours from parental notice.

Therefore, inasmuch as the Court has indicated that a state may require consent of both parents with the attendant possibility of indefinite delay, so long as a court bypass option is available, it is anomolous to suggest that the requirement of mere notice to both parents with a delay of 48 hours is more burdensome and may not be redeemed by the same bypass option.

IV. IF THE REQUIREMENT THAT BOTH PARENTS BE NOTIFIED ABSENT A JUDICIAL DETERMINATION RENDERS THE MINNESOTA STATUTE UNCONSTITUTIONAL, THE DISTRICT COURT ERRED IN HOLDING THAT REQUIREMENT NOT SEVERABLE FROM THE REMAINDER OF THE STATUTE CONTRARY TO THE EXPRESS INTENT OF THE LEGISLATURE.

In its decision to enjoin the Minnesota notice/bypass system in its entirety, the district court severed the 48-hour notice feature of the statute, but held the two-parent notice requirement non-severable. The determination of severability of unconstitutional provisions or applications from otherwise valid statutes is essentially a function of divining and giving effect to legislative intent where that can be done without rendering the statutory scheme unworkable or so altering it as to be materially different from that enacted. When dealing with state legislation:

> [The] standard is similar to that which we would apply in determining the severability of a federal statute: " 'Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.' "

Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 506 n.15 (1985) (citations omitted).

In the case of the Minnesota statute here at issue, the clear intent of the Minnesota legislature is expressly stated:

> If any provision, word, phrase or clause of this section or the application thereof to any person or circumstance shall be held invalid, such invalidity shall not affect the

> provisions, words, phrases, clauses or application of this section which can be given effect without the invalid provision, word, phrase, clause, or application, and to this end the provisions, words, phrases, and clauses of this section are declared to be severable.

Minn. Stat. § 144.343, subd. 7 (1988).

It therefore is clear that if the requirement of notification to both parents renders the statute invalid, the legislative intent is that at least one parent should be notified. For the trial court to *wholly* frustrate the legislature upon the assertion that severance of the two-parent language leaves the statute without definition or unenforceable simply ignores the legislative direction.

Plainly, the two-parent definition of "parent" is not inseparably intertwined in the entire fabric of the statute. All operative provisions of Minn. Stat. § 144.343, subds. 2-7, as they relate to the notice or the notice/bypass procedure with a two-parent definition, would operate likewise under a one-parent definition. Indeed, as the statute is presently written, it specifically contemplates one-parent notice where the other parent is dead or cannot be located.

Thus, the entire legislative system for parental notice or notice with judicial bypass could plainly be functional and would address, though not as fully, the same legislative purpose of promoting parental involvement by severing the definition of "parent" insofar as it is said to mean both parents.

Furthermore, the definition of parent in section 144.343, subd. 3, can be readily modified by excision to achieve this

result in sensible and cogent fashion.[36] Alternatively, if the two parent language were too intertwined to suffer removal from the definition, section 144.343 could be carried into effect without any special definition of the word "parent" simply by relying upon the common and approved usage of the term which includes either the mother or father by birth or adoption. Thus, if the "both parents" definition is the unconstitutional feature of the act, the definition may be severed in its entirety to permit effectuation of the legislative intent to the extent constitutionally permissible.

CONCLUSION

In Case No. 88-1309, defendants have urged this Court to reverse the court of appeals' holding that the State of Minnesota may not require advance notice to parents of abortions upon unemancipated, unabused minors. If, however, even this narrow recognition of the compelling interests of the state and parents in the care of children is constitutionally impermissible, it is clear that the Minnesota notice provision coupled with the court bypass option is, in all respects, both on its face and in actual practice, valid in light of the constitutional standards which have been set by the Court for statutes requiring parental consent to minors' abortions. The court of appeals should, therefore, be affirmed upon its decision not to enjoin the statute in its entirety.

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[36] For purposes of this section, "parent" means (BOTH PARENTS OF THE PREGNANT WOMAN IF THEY ARE BOTH LIVING,) one parent of the pregnant woman (IF ONLY ONE IS LIVING OR IF THE SECOND ONE CANNOT BE LOCATED THROUGH REASONABLY DILIGENT EFFORT) or the guardian or conservator if the pregnant woman has one. (Parenthetical material excised.)

Finally, even if the Court were to rule the notice/bypass system invalid due to perceived occasional difficulties arising from either the 48-hour or two-parent features of the notice element of the law, those features can be severed so as to permit the proper legislative purpose to be fulfilled at least in part.

Respectfully submitted,

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APPENDIX

APPENDIX TO DISTRICT COURT'S FINAL ORDER NOVEMBER 6, 1986

APPENDIX
Petitions
Abortion Notification Statute
Minnesota Statutes § 144.343, Subd. 6,
1981 Supplement
August 1, 1981 to March 1, 1986

Judicial District	No. of Counties	No. of Petitions Filed	No. of Petitions Granted	No. of Petitions Withdrawn	No. of Petitions Denied	No. of Petitions Appealed	No. of Petitions Affirmed	No. of Petitions Reversed
1.	7	78	77	1				
2.	1	793	793					
3.	11	52	51		1			
4.	1	2,314	2,311		3			
5.	15	4	1	1	2	1	1	
6.	4	279	278		1			
7.	10	7	5	2				
8.	13	2	2					
9.	17	6	6					
10.	8	38	34	2	2			
	87	3,573	3,558	6	9	1	1	

Minnesota Statutes (1988)

144.341 [LIVING APART FROM PARENTS AND MANAGING FINANCIAL AFFAIRS, CONSENT FOR SELF.]*

Notwithstanding any other provision of law, any minor who is living separate and apart from parents or legal guardian, whether with or without the consent of a parent or guardian and regardless of the duration of such separate residence, and who is managing personal financial affairs, regardless of the source or extent of the minor's income, may give effective consent to personal medical, dental, mental and other health services, and the consent of no other person is required.

144.342 [MARRIAGE OR GIVING BIRTH, CONSENT FOR HEALTH SERVICE FOR SELF OR CHILD.]

Any minor who has been married or has borne a child may give effective consent to personal medical, mental, dental and other health services, or to services for the minor's child, and the consent of no other person is required.

645.451 [DEFINITIONS, CONTINUED.]

Subdivision 1. The terms defined in the following subdivisions shall have the meanings given them for the purpose of any statute or law of this state now in force, for the purposes of any statute or law hereinafter enacted unless a different meaning is specifically attached to the terms or the context clearly requires different meaning.

Subd. 2. "Minor" means an individual under the age of 18.

Subd. 3. "Adult" means an individual 18 years of age or older.

Subd. 4. "Minority" means with respect to an individual the period of time during which the individual is a minor.

Subd. 5. "Majority" means with respect to an individual the period of time after the individual reaches the age of 18.

Subd. 6. "Legal age" or "full age" means 18 years of age or older.

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* Brackets denote Minnesota Revisor of Statutes headnotes.